[Cite as *State v. Orr*, 2009-Ohio-5515.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-G-2861**
- vs -	:	
WYLEE D. ORR,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 02 C 000081.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

John D. Lewis, Law Office of John D. Lewis, L.L.C., P.O. Box 2670, Ashtabula, OH 44005-2670 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This case is submitted to this court on the record and the briefs of the parties. Appellant, Wylee D. Orr, appeals the judgment entered by the Geauga County Court of Common Pleas. Following Orr's admission to violating the terms of his community control, the trial court imposed the remainder of Orr's prison sentence.

{¶2} In 2002, a six-count indictment was issued against Orr, charging him with the following offenses: robbery, in violation of R.C. 2911.02(A)(2) and a second-degree

felony; theft, in violation of R.C. 2913.02(A)(1) and a fifth-degree felony; assault, in violation of R.C. 2903.13(A)(C)(3) and a fourth-degree felony; assault, in violation of R.C. 2903.13(A) and a first-degree misdemeanor; resisting arrest, in violation of R.C. 2921.33(B) and a first-degree misdemeanor; and falsification, in violation of R.C. 2921.13(A)(3) and a first-degree misdemeanor.

{¶3} Orr pled guilty to a lesser-included offense of count one to wit: robbery, in violation of R.C. 2911.01(A)(3) and a third-degree felony. In addition, he pled guilty to the remaining counts of the indictment.

{¶4} Orr was sentenced to an aggregate sentence for his convictions, which included a six-month jail sentence, a six-month sentence in the Northeast Ohio Community Alternative Program, and a five-year term of community control. The sentencing entry provided that Orr would serve a three-year prison term if he violated the terms of his community control.

{¶5} In February 2005, Orr admitted to violating the terms of his community control and was sentenced to three years in prison, with credit for time served.

{¶6} In September 2006, the trial court granted Orr judicial release from prison. As part of its order, the trial court placed Orr on a five-year term of community control.

{¶7} In September 2007, the Adult Parole Authority filed a petition for violation of judicial release. Therein, it was alleged that Orr failed to report to his probation officer in Cuyahoga County and failed to report to the Adult Parole Authority on two occasions.

{¶8} A hearing was held on the petition in April 2008. At the hearing, Orr admitted to violating the terms of his community control. The trial court imposed the remainder of Orr's original three-year prison term, with credit for time served.

{¶9} On April 23, 2008, the trial court issued a judgment entry regarding the imposition of the remainder of Orr's prison term. However, this judgment entry stated that Orr was to serve the remainder of his sentence in the Geauga County Safety Center. In May 2008, the trial court issued a nunc pro tunc judgment entry, which stated Orr was to serve the remainder of his sentence in a state penal institution.

{¶10} In September 2008, Orr filed a motion for delayed appeal with this court. In December 2008, this court granted Orr's motion for delayed appeal and appointed counsel for him on appeal.

{¶11} Orr raises two assignments of error. Prior to addressing the merits of Orr's assigned errors, we first determine whether this appeal is moot, since Orr has completed his sentence.

{¶12} The state argues Orr's appeal is moot, since his appeal arises solely from his sentence, which has been completed. Orr claims this appeal is not moot, because the order he is actually appealing from is the underlying conviction. Both parties cite this court's opinion in *State v. Smith*, 11th Dist. No. 2000-L-195, 2002-Ohio-1330 in support of their positions. In *State v. Smith*, this court held: "an appeal of a felony *conviction* is not rendered moot even though the defendant has completed his or her sentence because '(a) person convicted of a felony has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed upon

him or her.'" Id. at ¶11, quoting *State v. Golston* (1994), 71 Ohio St.3d 224, syllabus. (Emphasis sic.) This court continued, holding:

{¶13} "However, 'this logic does not apply if appellant is appealing solely on the issue of *** his sentence and not on the underlying conviction. If an individual has already served his sentence, there is no collateral disability or loss of civil rights that can be remedied by a modification of the length of that sentence in the absence of a reversal of the underlying conviction.'" Id., quoting *State v. Beamon* (Dec. 14, 2001), 11th Dist. No. 2000-L-160, 2001 Ohio App. LEXIS 5655, at *4. (Secondary citation omitted.)

{¶14} The *State v. Smith* holding is not directly applicable to the case sub judice, because Orr is not appealing from his underlying conviction, nor is he appealing the length of the sentence imposed by the trial court. Instead, he is challenging the trial court's decision to revoke his community control.

{¶15} The Eighth Appellate District has held that an appeal from a finding of a probation violation is not moot, even in cases where the defendant has served his or her sentence. *State v. Williams* (Mar. 20, 2000), 8th Dist. No. 76090, 2000 Ohio App. LEXIS 1367, at *3, citing *Parma v. Melinis* (June 25, 1998), 8th Dist. No. 73483, 1998 Ohio App. LEXIS 2857 and *State v. Kirkland* (Sept. 21, 1999), 10th Dist. No. 98AP-1304, 1999 Ohio App. LEXIS 4344. For the following reasons, we agree with this holding.

{¶16} At first glance, it may appear that, since Orr has already served his entire sentence, there would be no remedy we could grant were we to find merit in either of Orr's assigned errors. See, e.g., *Columbus v. Duff*, 10th Dist. No. 04AP-901, 2005-

Ohio-2299, at ¶12. However, we must examine whether there is a "'collateral disability'" that could potentially be remedied by this court. *State v. Smith*, 11th Dist. No. 2003-L-046, 2004-Ohio-5312, at ¶11. (Citation omitted.) If this court were to find merit in one of Orr's assigned errors, we would conclude that Orr's constitutional rights were violated at the community-control-revocation hearing. The remedy would be to order a new hearing. If Orr were successful in his challenge at that hearing, the trial court would find that Orr did not violate his community control. While this finding would not directly affect the prison time Orr served in this instant matter, it could potentially have collateral consequences should Orr have subsequent involvement with the criminal justice system. That is, if Orr were to be convicted of an offense in the future, when the trial court determines the length of a sentence to impose or whether a community-control sanction is appropriate, it would presumably consider whether Orr had previously violated the terms of his community control. Thus, there is a collateral disability that could potentially be remedied by this court. Therefore, Orr's appeal is not moot.

{¶17} Orr's first assignment of error is:

{¶18} "Appellant was denied due process during the probation revocation proceeding below, contrary to the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶19} Orr claims he was denied his due process rights at the community-control-revocation hearing. Orr cites *Morrissey v. Brewer* (1972), 408 U.S. 471 for the proposition that several safeguards needed to be complied with in this matter. We note these rights have been extended to probation or community-control-revocation hearings. See *State v. Heinbach* (Aug. 31, 1995), 8th Dist. No. 67821, 1995 Ohio App.

LEXIS 3792, at *4. (Citations omitted.) However, in this matter, Orr admitted to the community control violations and waived the community-control-revocation hearing.

{¶20} Thus, the question before this court is what safeguards must a trial court comply with prior to accepting a defendant's admission to a community-control violation. The First Appellate District has examined this issue and held:

{¶21} "[T]he requirements of Crim.R. 11(C)(2) do not apply to a community-control-revocation hearing. *** A defendant faced with revocation of probation or parole is not afforded the full panoply of rights given to a defendant in a criminal prosecution. *** So a revocation hearing is an informal one, 'structured to assure that the finding of a *** violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the (defendant's) behavior.' ***

{¶22} "Instead, Crim.R. 32.3(A) applies to community-control-revocation hearings. Before a trial court imposes a prison term for a violation of the conditions of a community-control sanction, the court must hold a hearing at which the defendant is present and apprised of the grounds for the violation. ***" *State v. Alexander*, 1st Dist. No. C-070021, 2007-Ohio-5457, at ¶7-8. (Internal citations omitted.)

{¶23} Crim.R. 11(C) mandates certain requirements with which the trial court must comply prior to accepting a guilty or no contest plea to a felony offense. Crim.R. 32.3 provides the procedural framework that is to occur at a community-control-revocation hearing. Crim.R. 32.3 is entitled "revocation of community release" and provides, in pertinent part:

{¶24} "(A) Hearing. The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at

which the defendant shall be present and apprised of the grounds on which action is proposed. The defendant may be admitted to bail pending hearing.

{¶25} "(B) Counsel. The defendant shall have the right to be represented by retained counsel and shall be so advised. Where a defendant convicted of a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant, unless the defendant after being fully advised of his or her right to assigned counsel, knowingly, intelligently, and voluntarily waives the right to counsel. Where a defendant convicted of a petty offense is unable to obtain counsel, the court may assign counsel to represent the defendant."

{¶26} In this matter, the trial court conducted a hearing pursuant to Crim.R. 32.3(A), at which Orr was present and represented by counsel. During that hearing, the following colloquy occurred:

{¶27} "THE COURT: Is it then Mr. Orr's desire to waive the probable cause hearing and admit to the violation, Mr. Umholtz [defense counsel]?

{¶28} "MR. UMHOLTZ: Yes, it is, your Honor.

{¶29} "THE COURT: That's right, Mr. Orr?

{¶30} "MR. ORR: Yes.

{¶31} "THE COURT: And you know that if you do that, there won't be any hearing on the claim that you violated your community control, that you are saying, I did it. I am pleading guilty to it.

{¶32} "You understand that?

{¶33} "MR. ORR: Yes.

{¶34} "THE COURT: And you understand that that subjects you to the 242 days prison time unless I grant the 91 days of time that you have spent in Cuyahoga County on an unrelated charge, but you didn't bond out. You didn't bond out for the reason that you were advised you would simply be held here during that time?

{¶35} "MR. ORR: Yes.

{¶36} "THE COURT: And so you want to - - and I do intend to grant you credit on those 91 days - - so you wish then to go forward and waive your probable cause hearing and admit to the violation?

{¶37} "MR. ORR: Yes.

{¶38} "THE COURT: And you are satisfied, Mr. Umholtz, that Mr. Orr is doing so knowingly and voluntarily, Mr. Umholtz?

{¶39} "MR. UMHOLTZ: Yes, your Honor."

{¶40} This colloquy demonstrates Orr knowingly and voluntarily waived his right to a probable cause hearing and admitted to the community-control violations.

{¶41} Orr contends the record "fails to reflect either a written statement as to the evidence relied on and reasons for revocation, or any such oral statement." We disagree. The "petition for revocation of judicial release" charges that Orr "failed to report to his Cuyahoga County Probation Officer as instructed"; that Orr failed to report to the Adult Parole Authority on August 14, 2007; and that Orr failed to report to the Adult Parole Authority on September 6, 2007. While the better practice would have been for the trial court to specifically, orally advise Orr of the alleged violations at the hearing, we believe the trial court substantially complied with the Crim.R. 32.3 requirements by referencing the alleged violations in the record.

{¶42} Moreover, the following factors suggest Orr was given a fair and impartial hearing. First, we note the focus of the hearing quickly turned to a negotiated plea agreement. Defense counsel and the assistant prosecutor agreed that Orr would plead guilty to the community-control violations in exchange for a recommendation that he be given credit for time served in an unrelated case in Cuyahoga County.

{¶43} Second, we note that Orr was familiar with community-control-revocation hearings. The record demonstrates that in 2005, in this same case, Orr was before the trial court on another community-control violation. At that time, he also waived the probable cause hearing and admitted the violations as alleged. This suggests Orr was familiar with community-control-revocation hearings and fully understood the effects of waiving the hearing and admitting to the violations.

{¶44} Orr's first assignment of error is without merit.

{¶45} Orr's second assignment of error is:

{¶46} "Appellant was denied the effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶47} In *State v. Bradley*, the Supreme Court of Ohio adopted the following test to determine if counsel's performance is ineffective: "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668. Moreover, "'a court need not determine whether counsel's

performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, *** that course should be followed.'" Id. at 143, quoting *Strickland*, 466 U.S. at 697.

{¶48} Orr argues his trial counsel's performance was deficient because trial counsel did not ensure that the court advised him regarding the rights he was waiving by admitting to the violations. For the reasons stated in our analysis of Orr's first assignment of error, this claim lacks merit.

{¶49} In addition, we note that trial counsel advocated for a credit of 91 days that Orr served in Cuyahoga County. Pursuant to the plea agreement, the state recommended this credit. The trial court gave Orr credit for the 91 days served in Cuyahoga County, resulting in the remainder of Orr's prison term being reduced from 242 days to 151 days. This suggests trial counsel was familiar with the case and acted in Orr's best interest. Accordingly, we do not find that trial counsel's performance fell below an objective level of reasonable representation.

{¶50} Moreover, Orr has not demonstrated that he was prejudiced by counsel's allegedly deficient performance. To show prejudice in the context of a plea, the appellant must show "there is a reasonable probability that, but for counsel's error, the defendant would not have pleaded guilty." *State v. Brunkala*, 11th Dist. Nos. 2007-L-184 & 2007-L-185, 2008-Ohio-3746, at ¶11. (Citation omitted.)

{¶51} In this matter, the alleged violations were that Orr failed to report to his assigned probation officers. Orr has not directed this court to any evidence in the record that he in fact reported to his probation officers on the dates in question.

Moreover, we again note that Orr had previously admitted to violating his community control. This demonstrates he was familiar with community-control-revocation hearings and the effects of admitting to the violations. Accordingly, Orr has not demonstrated he was prejudiced by his trial counsel's performance.

{¶52} Orr's second assignment of error is without merit.

{¶53} The judgment of the Geauga County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.